UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re: PHELAN R. THOMAS and CARYL D. THOMAS,	:	**Case No. 97-706-CH**
Debtors.	:	**Chapter 13**

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ORDER – MOTIONS FOR FINDING VIOLATIONS OF THE AUTOMATIC STAY AND FOR SANCTIONS

Hearing on the Motions for Finding Violations of the Automatic Stay and for Sanctions was held on March 15, 1999. The United States of America was represented by Assistant United States Attorney William Purdy and the debtors were represented by David A. Morse, Garten and Wanek. At the conclusion of the hearing, the court took the matters under advisement upon a briefing schedule. Post-trial briefs have been filed, and the court now considers the matters fully submitted.

The court has jurisdiction of these matters pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Upon review of the pleadings, evidence, memorandums, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. On November 26, 1980, Caryl D. LaValle borrowed $2,500.00 from Tower Grove Bank and Trust Company through the Missouri Guaranteed Loan Program. This loan was assigned to Student Loan Marketing Association on February 13, 1981. (Exh. A).

2. On November 12, 1981, Phelan Thomas borrowed $3,000.00 from Chase Manhattan Bank, New Hyde Park, New York, through the Health Education Assistance Loan Program (HEAL). (Exh. D).

3. Phelan Thomas and Caryl LaValle were married in 1983.

4. Phelan Thomas acquired two more HEAL loans from Chase Manhattan Bank. One for $2,429.17 was taken on April 11, 1983, and the second for $2,945.00 was taken on February 7, 1984. (Exhs. E, F).

5. On February 19, 1997, Phelan and Caryl Thomas filed for relief under chapter 13 of the Bankruptcy Code. Caryl did not schedule her Missouri Guaranteed Student Loan. She testified that she believed it had been paid. Missouri Guaranteed SL, with addresses in Lincoln, Nebraska and Burbank, California, was scheduled as an unsecured nonpriority claim. Phelan Thomas was scheduled as the debtor on this claim. Caryl testified that she did not know whether this claim is for the HEAL loans. (Exh. 1).

6. The Internal Revenue Service was scheduled as a creditor on Schedule E with a claim of $67,000.00. This claim was assigned to the United States Attorney, Southern District of Iowa, Des Moines, Iowa. The United States Attorney, Southern District of Iowa, received notice of the bankruptcy filing. (Exh. 2).

7. The Internal Revenue Service claim in the Thomas bankruptcy proceeding was assigned to Assistant U. S. Attorney William C. Purdy who was working with counsel for Debtors regarding the tax claim. During these contacts counsel for the debtors did not bring up the subject of possible claims arising out of student loans to either Phelan Thomas or Caryl Thomas.

8. On February 26, 1997, the Department of Health and Human Services (DHHS), Rockville, Maryland, sent a letter to Phelan Thomas stating that his HEAL account was seriously delinquent. This letter invited a response and informed Phelan Thomas that if he did not take action to pay the debt or make a request to enter into a repayment agreement, the DHHS would refer the debt to other agencies for administrative offset. (Exh. G).

9. Debtors did not respond to this correspondence, amend their schedules or advise DHHS that they had filed for bankruptcy protection.

10. On February 27, 1997, the Department of Education (DOE), San Francisco, California, sent Caryl Thomas a Certificate of Indebtedness which stated that she owed the United States $2,500.00 based on the loan from Tower Grove Bank and Trust Company. (Exh. 5).

11. Debtors did not amend their schedules or advise DOE that they had filed for protection under the bankruptcy code.

12. The claim by the Department of Education against Caryl Thomas was assigned to Gary L. Hayward, Assistant U. S. Attorney, Southern District of Iowa, for prosecution. At this point in time AUSA Hayward and AUSA Purdy did not know of the others' involvement in the claims against the debtors.

13. On April 14, 1997, Hayward, AUSA, sent a letter to Caryl Thomas demanding $3,180.37, and stating that a suit would be filed if payment was not received within 15 days. A copy of the Certificate of Indebtedness accompanied the letter. Caryl Thomas was advised that if she had any questions that she should contact a named person at the U. S. Attorney's office with a local telephone number. (Exh. B).

14. Caryl Thomas did not respond to this letter or amend her bankruptcy schedules.

15. On May 12, 1997, AUSA Hayward filed a Complaint for Money Damages in the United States District Court, Southern District of Iowa, Central Division against Caryl Thomas, Civil No. 4-97-CV-10345 (Exh. 5).

16. On May 13, 1997, AUSA Hayward sent a letter to Caryl Thomas stating that a complaint had been filed. If the full amount was paid within 15 days, the United States would dismiss the case. (Exh. 4). A copy of the complaint filed on May 12, 1997 was attached to this letter.

17. Caryl Thomas did respond to the letter of May 13, 1997 by telephoning a debt collection agent handling the collection of student loans in the U. S. Attorney's office. Caryl advised this debt collection agent that she was a friend of the U. S. Attorney and she needed time to collect cancelled check(s) to show payment on her student loan. Caryl did not advise this agent that she had filed a bankruptcy petition.

18. Clerks in different departments in the U. S. Attorney's Office noticed a similarity of names in cases they were processing and realized that Caryl Thomas had filed a bankruptcy petition. The debt collection clerk for student loans advised AUSA Hayward of this fact.

19. On June 13, 1997, AUSA Hayward filed a Notice of Automatic Stay in Civil No. 4-97-CV-10345 in the U. S. District Court, Southern District of Iowa. The Notice stated that the defendant had filed a bankruptcy petition on February 24, 1997, and the District Court was notified that the plaintiff would not proceed with the case until relief from stay was granted or until the defendant received a discharge. (Exh. 6).

20. AUSA Hayward called the DOE and asked that they check for another loan for Caryl Thomas. No request was made concerning loans in the name of Phelan Thomas. This AUSA did not connect the names of Caryl and Phelan Thomas as the last name was a fairly

common name and Caryl Thomas was using a home address whereas Phelan Thomas' records were under an office address.

21. On July 21, 1997, AUSA Hayward filed a Motion for Relief from Stay in the U.S. District Court in the case of United States v. Caryl Thomas, Civil No. 4-97-CV-10345. This motion was served on the defendant, Caryl Thomas. She did not advise her attorney of the motion, an objection to the motion was not filed, and the District Court granted the motion.

22. Counsel for Debtors was not advised of the correspondence and telephone calls regarding the student loans or the HEAL loans until sometime in September 1997.

23. A few days before September 17, 1997, AUSA Hayward had a telephone conversation with Jerrold Wanek, counsel for Caryl Thomas, and on September 17, 1997, Wanek wrote a letter to Hayward suggesting that the complaint in District Court be dismissed.

24. On September 19, 1997, counsel for Caryl Thomas filed a motion to vacate the Order for Relief from Stay and a Motion to Dismiss the case on the basis that the action was barred by 11 U.S.C. § 362. (Exhs. 11, 12). The United States dismissed the case with prejudice and subsequently, the court entered a dismissal order.

25. On November 12, 1997, the Debt Management Branch, Division of Fiscal Services, Health Resources Administration sent a notice to Phelan Thomas that his HEAL account was delinquent. The notice stated that Thomas must contact them within 60 days and indicate how he would resolve the indebtedness. If he failed to do so, then the case would be turned over to the United States Attorney for forced collection. (Exh. H).

26. On July 9, 1998, Phelan Thomas received a Certificate of Indebtedness from the DHHS certifying that he owed $10,656.67 arising from three HEAL accounts. This letter gave the history of the accounts, the multiple attempts to collect on the loans, and the failure on the

part of Phelan Thomas to respond to any of these attempts. The certificate stated that the debt had been referred to the Department of Justice for forced collection. The certificate directed payment to be mailed to the United States Attorney, Southern District of Iowa, U.S. Courthouse Annex, 2nd Floor, 110 E. Court Avenue, Des Moines, IA 50309-2043. (Exh. 21).

27. On July 20, 1998, AUSA Hayward sent a letter to Phelan Thomas claiming a debt of $10,656.67 pursuant to the HEAL accounts. The letter stated that if payment was not made within 15 days, then a suit would be filed in United States District to recover the amount owed. (Exh. 20).

28. On July 23, 1998, DHHS referred Phelan Thomas to the DHHS Office of Inspector General for exclusion from participation in the Medicare and Medicaid programs pursuant to 42 U.S.C. §1395cc and §1320a-7(b)(14). The DHHS Office of Inspector General received notice of the Thomas bankruptcy in sufficient time to cancel this order and the exclusion has not occurred.

29. On August 31, 1998, the United States filed a proof of claim in the Thomas bankruptcy case 97-706 for $9,559.05 for the HEAL accounts. (Exh. 28).

30. Phelan Thomas' name was forwarded to the United States Office of Personnel Management (OPM) and on November 13, 1998, OPM sent a Notice of Debarment to Phelan Thomas. The OPM was proposing to debar Thomas based on the DHHS exclusion of him from participation in certain programs.

31. The naming of Phelan Thomas on the OPM referral list has been retracted. Phelan Thomas' participation in federal financial and nonfinancial assistance programs has not been barred.

32. Debtors claim that the actions on the part of DHHS have caused medicare/medicaid payments to be offset and other payments blocked. Caryl Thomas testified that she thought that there were three of these patients and she estimated the value per patient at $2,000.00 each. This testimony was not supported by office records showing the type of work done, the claims filed, the insurance companies involved, and the notices of rejection.

33. Debtors seek an award of $1,500.00 in attorney's fees. This prayer is not supported by any statement showing services rendered, the time expended, or expenses incurred.

DISCUSSION

This matter comes before the court on the debtors' Motions for Finding Violations of the Automatic Stay and for Sanctions. The debtors allege nine separate violations of the automatic stay and request that compensatory damages, punitive damages, costs, and attorney fees be imposed upon the United States. The United States acknowledges that some violations took place, but argues that the violations were not willful, therefore, sanctions are not appropriate. Additionally, the United States argues that all necessary corrective steps have been taken and no order requiring further measures is necessary.

Section 362 provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of-
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;...
> >
> > (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;
> 11 U.S.C. § 362 (1997)

The Code defines "entity" to include person and governmental unit. 11 U.S.C. § 101(15). "Governmental unit" includes the United States, and any department, agency, or instrumentality of the United States except the United States Trustee while serving as a trustee in a bankruptcy case. 11 U.S.C. § 101(27). Therefore, the automatic stay provision encompasses action by the United States Attorney, the Department of Health and Human Services, the Department of Education, and the Office of Personnel Management.

"The automatic stay is a self-executing provision of the Code and begins to operate nationwide, without notice, once a debtor files a petition for relief." In the Matter of Schraff, 143 B.R. 541, 542 (S.D. Iowa 1992). In this case, the Thomases' filed their chapter 13 petition on February 19, 1997. Any action by United States or one of its departments or agencies to collect a debt or commence or continue an administrative action after that date is a violation of the automatic stay.

The Thomases allege the following violations:

1. April 14, 1997 letter to Caryl Thomas from AUSA Hayward demanding payment and stating that a lawsuit would be filed if payment was not received.
2. May 13, 1997 letter stating that a lawsuit had been filed, but it would be dismissed if the debt was paid in 15 days.
3. July 21, 1997 Motion for Relief of Stay filed in the civil case against Caryl Thomas.
4. July 20, 1998 letter to Phelan Thomas from AUSA Hayward claiming a debt for HEALs and stating that if payment was not made in 15 days that a lawsuit would be filed.
5. July 9, 1998 Certificate of Indebtedness sent to Phelan Thomas stating that the debt had been referred to the Department of Justice for collection and requesting that payment be made to the U.S. Attorney Office in Des Moines, Iowa.
6. Notice of proposed offset of federal income tax return.
7. November 12, 1997 Debt Management Branch letter sent to Phelan Thomas requesting

resolution of the HEAL indebtedness or the case will be turned over to the U. S. Attorney.

8. February 26, 1997 letter to Phelan Thomas from DHHS announcing that his HEAL account was delinquent and stating that it would be referred to other agencies for administrative offset.
9. November 13, 1998 Notice of Proposed Debarment from the OPM to Phelan Thomas.

The court finds eight violations of the automatic stay. The Thomases have not proven a date for the proposed offset of federal tax return. The court has no way of knowing if this notice was sent before or after the filing of the chapter 13 petition, therefore the court does not find this notice to be a violation of the stay. The court cannot find that the Motion for Relief of Stay is a violation, even though AUSA Hayward erred greatly by filing it in the wrong court. The Code provides that such a motion is appropriate for a party in interest and may be granted by the court after notice and hearing. 11 U.S.C. § 362(d). Additionally, the court finds that the filing of the civil case for money judgment constitutes a separate violation of the stay.

Money damages are available for willful violations of the automatic stay. Section 362(h) provides:

> (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362.

"A willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition." Knaus v. Concordia Lumber Company (In re Knaus), 889 F.2 773, 775 (8th Cir. 1989). It is not necessary that the creditor intended to violate the stay, only that the creditor knew of the bankruptcy and intended to do the violating act. Schraff, 143 B.R. at 543. Notice of the bankruptcy was given to the United States Attorney, Southern District of Iowa, counsel for DHHS, DOE, and OPM.

The court finds that the February 26, 1997 letter by DHHS to Phelan Thomas is not a willful violation, because DHHS was not scheduled as a creditor and did not have notice of the

bankruptcy at that time. The court finds the other violations to be willful. The United States Attorneys Office in Des Moines, Iowa was given notice of the Thomases' bankruptcy pursuant to L.R. 10 when the Internal Revenue Service was scheduled as a creditor. The United States Attorneys Office in Des Moines appears on the creditor matrix. Therefore, all actions taken by AUSA Hayward to collect debts after the filing of the bankruptcy petitions are willful violations of the stay. Sometime after June 13, 1997, AUSA Hayward called the DOE and asked that they check for more loans by Caryl Thomas. The Thomases filed a joint chapter 13 petition. Both Phelan's and Caryl's names and social security numbers appear on the petition. AUSA Hayward did not inquire about loans by Phelan Thomas. Had he done so, the HEAL loans would have been uncovered, and the respective agencies would have been notified prospectively of the bankruptcy rather than after violations were committed. Consequently, the listed actions taken by governmental agencies constitute willful violations of the automatic stay.

The United States has waived sovereign immunity for violations of the automatic stay. 11 U.S.C. § 106. Compensatory damages, costs, and attorney fees under § 362 may be awarded against the United States and its agencies. 11 U.S.C. § 106(a)(3). Any award for costs or fees must be consistent with the provisions and limitations of 28 U.S.C. § 2412(d)(2)(A). Id. However, punitive damages cannot be imposed against the United States or its agencies. Id. Any recovery against the United States must be offset against the debt owed. 11 U.S.C. § 106(c).

The debtors allege that they lost at least three clients because they could not process claims through government agencies due to disqualification and "red flags" attributable to the misreported status of the student loans. Additionally, the debtors allege that they have incurred expenses from being forced to repeatedly address payment demands from various government

agencies, including the United States Attorney Office. In particular, they request compensation for having the civil case against Caryl Thomas dismissed and the order vacated.

The Eighth Circuit has addressed the propriety of awarding damages, costs, and attorneys' fees for automatic stay violations in Lovett v. Honeywell, 930 F.2d 625 (8th Cir. 1991). "[T]o recover under section 362(h), the party seeking the award must show that he was injured by the violation of the stay..." Id. at 628. In Honeywell, the debtor, Transportation Systems International, Inc., was a trucking company that contracted to transport products for Honeywell, Inc. As a motor carrier subject to the Interstate Commerce Act, the debtor was required to file a tariff with the Interstate Commerce Commission (ICC) setting forth the amount of fees charged for its transportation services. It could only collect at rates published in the filed tariff, and those rates were required to be reasonable. After the trucking industry was deregulated in 1980, carriers began negotiating rates with shippers, and many carriers failed to file the negotiated rates with the ICC. Later, the carrier or a bankruptcy trustee would sue the shipper to collect the undercharge, the difference between the tariff rate and the negotiated rate. Id. at 626. Between 1984 and 1987, the debtor negotiated rates with Honeywell that were less than the rate specified in the tariff. The debtor did not file the negotiated rate with the ICC. When creditors successfully forced an involuntary Chapter 7 in 1987, the trustee pursued undercharges from Honeywell. Honeywell responded by filing a petition with the ICC seeking a declaratory judgment that the collection of undercharges was an unreasonable practice. Id. at 626-27. Honeywell's petition was based on a newly effective advisory decision by the ICC stating that it would accept initial jurisdiction of negotiated rate-undercharge cases without awaiting court referral. Id. The trustee notified Honeywell that its commencement of the action before the ICC was a violation of the automatic stay and requested it withdraw the pleadings.

When Honeywell refused, the trustee filed a motion for a temporary restraining order and for an order holding Honeywell in contempt and imposing sanctions. Id. at 627.

In determining that actual and punitive damages were not appropriate, the 8th Circuit Court based its decision on the "narrow circumstances in the case." Id. at 629. Of particular importance was the timing of decisions by the 8th Circuit and the ICC concerning undercharge collection. Id. The circuit court additionally stated that there was insufficient evidence in the record to support an award of actual damages, and therefore an award of attorneys' fees was not appropriate. Id. The court was concerned that the only evidence of damage consisted of the "time expended by the trustee's counsel in bringing the motion for the TRO and sanction." Id. No evidence actually existed of time actually expended in defending the administrative action. Id.

In this case, there is insufficient evidence to award damages for lost business. In testimony, Caryl Thomas stated that at least three patients were lost. However, no other evidence of who, or when, or what services these patients required was ever presented. Mrs. Thomas merely asserted that the average patient of this sort was billed around $2,000.00 resulting in a $6,000.00 loss of revenue. Additionally, the court notes that the debtors are not entirely blameless in this situation. Had all the student loans been properly scheduled, and had the debtors promptly notified each creditor of the bankruptcy petition after demand was made, some of the problems would not have manifested. Equitable considerations require that the debtor shoulder some of the responsibility for creating the problem. See generally, Matthews v. Rosene, 739 F.2d 249 (7th Cir. 1984).

The debtors claim that they have incurred over $1500.00 in attorneys' fees addressing and defending these violations. They also claim fees for the prosecution of this motion. The debtors

have produced evidence of the appearance, motion to vacate order, and motion to dismiss prepared by their attorney in Caryl Thomas's civil case brought by the United States. They have also produced correspondence drafted by their attorney to two Assistant United States Attorneys and the Debarring Official of the OPM. The court finds that the debtors have produced sufficient evidence of time and effort expended beyond the bringing of the motion for sanctions to satisfy Honeywell's standard for damages. The court appreciates that when debtors have to pay an attorney to address violations of the stay, the expenses incurred, at least those beyond bringing of the § 362(h) motion, are a real monetary damage to the debtor. In re Fridge, 239 B.R. 182,191 (Bankr. N. D. Ill. 1999).

While this court has made it quite clear that attorney fees must be specifically documented in order to be awarded, In re Pothoven, 84 B.R. 579 (Bankr. S.D. Iowa 1989); In re Karas, No. 91-2890-CH (Bankr. S.D. Iowa April 28,1992)(Judge Hill decision #221), § 106(a)(3) requires that an order for costs and fees against any governmental unit must be consistent with 28 U.S.C. § 2412(d)(2)(A). In maintaining that consistency, the court believes that it must also adhere to the requirement of § 2412(d)(1)(B). Therefore, debtor must submit an application to the court within 30 days of final judgment complying with the provisions of 28 U.S.C. § 2412. Pursuant to § 106(c), any amount awarded will be set off against the claims of the United States.

Had the debtors provided credible evidence of damage in lost clientele, this court would not hesitate in assessing those damages against the United States. As previously noted, the bankruptcy petition contains both Phelan and Caryl Thomas' names and social security numbers. The United States Attorneys Office has sophisticated equipment at its disposal whereby it could have ascertained any claims that United States had against the Thomases. It need not rely on a

happenstance conversation between two personnel to determine that a party to a case had already filed a bankruptcy petition. The U.S. Attorneys Office contains experienced legal staff that is familiar with bankruptcy procedures and the effect of the automatic stay. This court will not allow the U.S. Attorneys Office " to make less of an effort to comply with the automatic stay provisions of the Code...than it makes to collect from the debtor." In re Solis, 137 B.R. 121,133 (Bankr. S.D. N.Y. 1992)(discussing IRS violations of the automatic stay provision).

The debtors also request that the court find the United States in contempt of court for violation of the automatic stay. The court is not so inclined. Section 362(h) provides the remedy for the individual debtor in this case. Contempt is a remedy for the violation of a court order, not for the violation of a statute. In re Just Brakes, 108 F.3d 881, 885 (8th Cir. 1997); See also In re Calstar, 159 B.R. 247 (Bankr. D.Minn. 1993)(discussing the unavailability of contempt as a sanction for violations of the automatic stay). However, § 105(a) provides the bankruptcy court with broad equitable powers to remedy violations of the automatic stay. In re Just Brakes, 108 F.3d at 884. The court will not exercise those powers in this case. The United States has presented credible evidence that steps have been taken to correct matters which resulted in the violations.

ORDER

IT IS ACCORDINGLY ORDERED as follows:

1. The United States is found to be in violation of the automatic stay in eight different instances.

2. Debtors shall file an application in compliance with 28 U.S.C. § 2412. Any amount awarded will be set off against the claim of the United States pursuant to 11 U.S.C. § 106(c).

3. Debtors' Motion for Sanctions is DENIED.

Dated this _____ day of February, 2000.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT